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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

PETER PANNELL,

Petitioner,

against

SS. *AMERICAN FLYER*, her engines, boilers, etc., and UNITED STATES LINES COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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IN THE

Supreme Court of the United States

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No. .

PETER PANNELL, Petitioner,

against

SS AMERICAN FLYER, her engines, boilers, etc., and UNITED STATES LINES CO., Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on January 28, 1959.

Citations Below.

The opinion of the United States District Court, printed in Appendix "A" hereto, *infra*, pages 18-32, (Vol. I, page 13)[1] is reported at 157 F. Supp. 422, 1958 A. M. C. 1428. The opinion of the Court of Appeals for the Second Circuit, printed in Appendix "B" hereto, *infra*, pages 35-38, (Vol. II, page 48), is reported at 263 F. (2d) 497.

[1] References are to the appendices prepared for the use of the Court below.

Jurisdiction.

The judgment of the Court of Appeals for the Second Circuit was dated and entered on January 28, 1959, (Vol. II, page 52), page 39, *infra*. The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254 (1).

Question Presented.

May a common carrier successfully assert against cargo a bill of lading term repugnant to the Carriage of Goods by Sea Act, where the carrier has made the Act the prevailing law of the contract?[2]

Statement.

Invoking the admiralty and maritime jurisdiction of the United States, Petitioner Peter Pannell filed a libel (Vol. I, page 3) against respondent, United States Lines Company, alleging damage to a yacht which was delivered to respondent as a common carrier (Vol. II, page 1) at London to be carried on deck to New York. At New York, as the yacht was lifted from the cradle in which it rested, it was negligently dropped, causing damage greatly in excess of $500.00. The respondent admitted its liability, but contended it was limited to $500.00.

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[2] The question arises from the action of the respondent in incorporating in four different parts of the bill of lading, the United States Carriage of Goods by Sea Act or equivalent language which, in the circumstances of this case, grants petitioner a full recovery for damage to his yacht on the basis of $500.00 per customary freight unit. In another part of the bill of lading, it provided in effect, that libelant shall not be entitled to $500.00 per customary freight unit, despite the Act's prohibitions against lessening liability.

The bill of lading (Vol. I, page 32) contained many provisions relevant to the question of the respondent's limitation.[3]

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[3] "2. This bill of lading shall have effect *subject to* the provisions of the Carriage of Goods by Sea Act of the United States, approved April 16, 1936, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the Carrier of any of its rights, immunities or limitations or an increase of any of its responsibilities or liabilities under said Act. *If any term of this bill of lading be repugnant to said Act to any extent, such term shall be void to that extent but no further.* [Clause Paramount]. (Emphasis supplied)

"13. * * * In respect of goods carried on deck, and stated herein to be so carried, all risk of loss or damage by perils inherent in or incident to such carriage shall be borne by the shipper and consignee, but in all other respects the custody and carriage of such goods shall be governed by the terms of the bill of lading and the carrier shall have the benefit of all and the same rights, immunities, exceptions and limitations contained in said Carriage of Goods by Sea Act, notwithstanding Sec. 1(c) thereof, or the corresponding provision of any similar Act that may be applicable."

"23. In the event of any loss, damage or delay to or in connection with goods exceeding in actual value $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, the value of the goods shall be deemed to be $500 per package or per customary freight unit, as the case may be, and the carrier's liability, if any, shall be determined on the basis of a value of $500 per package or per customary freight unit, unless the nature and a higher value shall be declared by the shipper in writing before shipment and inserted in this bill of lading.

"In the event of any loss, damage or delay to or in connection with the goods of a value of $500 or less than $500 per package, lawful money of the United States or in case of goods not shipped in packages, per customary shipping freight unit, the carrier's liability, if any, shall be limited to the invoice value of the goods unless otherwise stated herein, on which basis the rate of freight is adjusted. It is not intended that such invoice value shall be an agreed valuation and it is agreed that in no event shall this clause operate to increase the extent of the carrier's liability beyond the market value at port of discharge, if that be less than invoice value.

"It is understood that the meaning of the word 'package' includes pieces and all articles of any description except goods shipped in bulk."

Clauses 2 and 13 of the bill of lading incorporated the provisions of the Carriage of Goods by Sea Act[4] and made the bill of lading subject to that law. Clause 2 also stated:

> "If any term of this bill of lading be repugnant to said Act to any extent, such term shall be void to that extent but no further."

Clause 13 of the bill of lading[5] gave the carrier the "package" limitation of the Act contained in §1304(5).[6] Clause 23 of the bill[7] twice repeated substantially the language of §1304(5) of the Act.

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[4] 46 U. S. C. §1300 *et seq.* Section 1304(5) of that Act is the "package" limitation, as follows:

> "(5) Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, *or in case of goods not shipped in packages, per customary freight unit*, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. . .
>
> . . . . . .
>
> "By agreement between the carrier, master, or agent of the carrier, the shipper, another maximum amount than that mentioned in this paragraph may be fixed: PROVIDED, that such maximum shall not be less than the figure above named . . ." (Emphasis supplied).

Section 1303 (8) of the Act provides:

> "(8) Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect. . . . Apr. 16, 1936, c. 229 §3, 49 Stat. 1208."

[5] See footnote 3, *supra*.

[6] See footnote 4, *supra*.

[7] See footnote 3, *supra*.

Nevertheless, the second last sentence of Clause 23 contradicts §1304(5) of the Act and the rest of Clause 23 by stating:

> "It is understood that the meaning of the word 'package' includes pieces and all articles of any description except goods shipped in bulk."

No value for the yacht was stated in the bill of lading. The question, as stated by the District Court (Vol. I, page 17; App. A, *infra* page 23) is "simply the measure of respondent's limited liability."[3]

The District Court held respondent liable for the damage to the yacht with a limitation of $500.00 per customary freight unit of 40 cubic feet (Vol. I, page 27; App. A, *infra* page 32).

The grounds for the District Court's opinion were:

1. The incorporation of the Carriage of Goods by Sea Act in Clause 2 made it the prevailing law of the shipment (App. A, *infra*, page 28).

2. The provision that all bulk shipments are packages is void, being in conflict with §1304(5) of the Carriage of Goods by Sea Act (App. A, *infra*, page 28).

3. Even applying merely as a contractual term the Act overcomes the repugnant "package" definition since Clause 13 specifically makes §4(5) of the Act applicable to the shipment and only generally refers to the bill of lading (App. A, *infra*, pages 23, 27).

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[3] Trial was had before the Honorable Edmund L. Palmieri in the District Court for the Southern District of New York.

4. Since the limitation provision was inserted by the shipowner for his own benefit, it must be construed most strongly against him (App. A, *infra*, page 29):

(a) Clause 23 is internally inconsistent.

(b) The "package" provision is peculiar when considered with the normal use of the term throughout the bill of lading.

(c) The bill of lading is an intricate and contradictory document which takes away in one clause what it gives in another.

5. Since the yacht is not a package as that term is used in the Act or in Clause 23, the carrier's limitation is $500.00 per customary freight unit (40 cubic feet). (App. A, *infra*, page 32).

Upon appeal the Court of Appeals for the Second Circuit modified the interlocutory decree and held the respondent liable for only $500.00 (Vol. II, page 51; App. A *infra*, page 38) on the single ground that where a statute is incorporated its provisions are merely terms of the contract and the definition of the word "package" contained in Clause 23, while repugnant to the Act, prevailed over it. The Court relied upon its decision in *The Westmoreland*, 2 Cir., 86 F. (2d) 96, 1936 A. M. C. 1680.

Reasons for Granting the Writ.

(1) The Courts of Appeals for the Fourth and Fifth Circuits have held contrary to the decision of the Court of Appeals for the Second Circuit in this case.

(2) This Court and the Court of Appeals for the Fifth and Ninth Circuits have held contrary to the theory of bill of lading interpretation employed by the Court of Appeals for the Second Circuit in this case, and

(3) The question presented is one of wide international concern to and a subject of serious disagreement in the maritime and shipping industry.

(1) The holding of the Court of Appeals that the Carriage of Goods by Sea Act, being incorporated by agreement, is subservient to a contrary term in the bill of lading is directly in conflict with three decisions of the United States Court of Appeals for the Fifth Circuit:

The Framlington Court, 5 Cir., 69 F. (2d) 300, 1934 A. M. C. 272, cert. denied, 292 U. S. 651;
Waterman S. S. Corp. v. *United States S R & M Co.*, 5 Cir., 155 F. (2d) 687, 1946 A. M. C. 997, Cert. denied 329 U. S. 761;
The Zesta, 5 Cir., 212 F. (2d) 137, 1954 A. M. C. 899,

and also with two decisions of the United States Court of Appeals for the Fourth Circuit:

Atlantic Gulf & West Indies S. S. Co. v. *Interocean Oil Co., (The Agwimoon)*, 4 Cir., 31 F. (2d) 1006, 1929 A. M. C. 570, Cert. denied, 279 U. S. 874;
The Temple Bar, 4 Cir., 137 F. (2d) 293.

Each of the three decisions of the Court of Appeals for the Fifth Circuit involved shipments to which no statute applied *ex proprio vigore*. But in each, the prevailing Federal statute was incorporated in the contract by the carrier. And in each document of carriage there was a provision contrary to the terms of the incorporated Act. The Court of Appeals for the Fifth Circuit, in each case, held that the shipowner was as much bound by the terms of the Act he had freely incorporated as if it had applied

by law and he was bound to take the Act with its burdens as well as its benefits.[9]

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[9] *The Framlington Court, supra,* involved a full cargo of newsprint, private carriage, to which the Harter Act by judicial interpretation (46 U. S. C. §§190-196) does not apply of its own force. It was, however, incorporated into the charter party. Also in the Charter was a provision that "the steamer has liberty . . . to sail without pilots . . ." The ship stranded due to lack of a pilot aboard. The Court of Appeals for the Fifth Circuit held, on page 304:

> "The Harter Act is a very comprehensive statute dealing with relations between vessel and shipper, and has been on the books for over 40 years. It has been frequently interpreted by the courts, and its meaning is well known in the shipping trade. Having incorporated the Harter Act by reference in the charter, the parties are bound to take it with its burdens as well as its benefits and it is controlling. Under the provisions of the act the shipowner is not liable for losses caused by faults or errors of navigation if he has used due diligence to make the ship seaworthy, . . . There is no material difference between the exemption from liability for stranding written into the charter and the provisions of the Harter Act. Under either clause, by necessary implication, the ship is liable if the owner has failed to use due diligence to make her seaworthy. But the clause giving liberty to sail without pilots is entirely inconsistent with the warranty of seaworthiness, and the obligation to use due diligence to make the vessel seaworthy, if failure to employ a local pilot would render the vessel unseaworthy at the beginning of the voyage. Under a reasonable construction of the charter, it could have no application as applied to the issues presented in this case."

Waterman S.S. Corporation v. *United States Smelting, Refining & Mining Co., supra,* involved an on-deck shipment to which the Carriage of Goods by Sea Act does not apply of its own force (§1(c)). The bill of lading, however, incorporated the Act. The face of the bill of lading stated that the shipment was carried on-deck at "Owner's risk." The carrier argued that this notation left the burden on the cargo owner to prove the carrier was negligent, but the Court of Appeals for the Fifth Circuit, at page 691, applied on the carrier the full burden of proof contained in the incorporated Act.

The Zesta, 5 Cir., *supra,* involved a charter party which contained the same U. S. A. clause Paramount which is involved in Clause 2 of the instant case. Another clause of the charter party stated the vessel was "not responsible for damages to cargo resulting from any other causes but the actual negligence on the part of the crew." This clause conflicts with the burden of the vessel under the Carriage of Goods by Sea Act to show it exercised due diligence to make the vessel seaworthy where unseaworthiness causes the damage. While the Court of Appeals states that the conflict between the incorporated Act and the exculpatory clause was immaterial in this case, it nevertheless, on page 143, placed upon the owners the burden under the Act "of going forward with

The two decisions of the Court of Appeals for the Fourth Circuit each holds that the incorporation of the Harter Act or the Carriage of Goods by Sea Act in a contract of water carriage makes the Act controlling over the shipment and nullifies inconsistent provisions contained in the same document.[10]

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evidence either showing that the damage was not caused by the unseaworthy condition of the Zesta and its defective refrigeration equipment, or that they had used due diligence to make the vessel seaworthy for this particular voyage."

[10] *The Agwimoon*, 4 Cir. *supra*, involved a charter for a full shipload of stove oil. The charter incorporated the Harter Act and in the same document stated:

"The steamer is not to be accountable for leakage."

The contradiction was resolved by the Court of Appeals for the Fourth Circuit by its holding, on page 1007:

> "The respondent appealed from the interlocutory decree of the trial court, assigning error in its failure to hold that the leakage exemption in the charter party exempted claimant from liability for the loss, in holding that the reference to the Harter Act (46 U. S. C. A. §§190-195) in the charter party operated to displace the leakage exception . . .
>
> "The learned District Judge, in a carefully considered opinion . . . passed upon the questions of fact and law arising in the case. To this opinion of the District Court reference is especially made as containing an able and comprehensive discussion of the questions involved, with which we are in accord, and we find no reversible error therein."

The District Court through Judge William C. Coleman in answer to the shipowner's contention that since the Harter Act was applicable only by agreement of the parties and not by force of law, the leakage clause had the same effect as if the Harter Act had not been mentioned, stated at 24 F. (2d) 864, 867:

> "This argument seems to the court to be unsound. The parties have agreed to make the act applicable to their contract, and have expressly incorporated it. . . . If the act is not effectuated in the same manner that it would be for a common carrier—that is, in all its terms—then the agreement amounts to nothing. In The Cornelia (D. C.), 15 F. (2d) 245, the court so decided. It was there held that the vessel, having failed to prove use of due diligence, could not rely on an exemption clause, in view of a provision incorporating the Harter Act in the charter. The court said (page 247):
>
> 'But here the parties agreed that their contract should be governed by all the provisions and exemptions of that act. Necessarily exemptions contained in the contract and in the bills of lading, the provisions of which were embodied in the contract, are, as the parties agreed they should be, subject to the provisions of the Harter Act, not because the agreement of carriage is a shipping document within the meaning

Although petitioner referred to these decisions, the Court of Appeals for the Second Circuit makes no mention of them but merely extends the rule of *The Westmoreland*, 2 Cir., 86 F. (2d) 96, 1936 A. M. C. 1680 to a case of common carriage.

In the *Westmoreland* Case, the Court of Appeals for the Second Circuit, held an inconsistent provision in a charter party to prevail over the incorporated Harter Act.[11]

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of that statute, but because the parties themselves agreed that the statute should apply to their contract of carriage.'"

The Temple Bar, 4 Cir., *supra*, concerned a case of private carriage where the charter party incorporated both the Harter Act and the clause Paramount, which incorporates the United States Carriage of Goods by Sea Act of 1936. Since the Carriage of Goods by Sea Act by its terms substantially supersedes the Harter Act, the Court of Appeals for the Fourth Circuit held on pages 294-295:

> "The charter party provided that the contract should be subject to the terms and provisions of the Harter Act, and that the Paramount Clause should be incorporated, which subjects the contract to the provisions of the Carriage of Goods by Sea Act of April 16, 1936, 49 Stat. 1207, 1213, 46 U. S. C. A. 1300-1315, and invalidates any term of the charter to the extent that it is repugnant thereto.
>
> * * * * * *
>
> "The controlling effect of the Carriage of Goods by Sea Act, however, has not been seriously disputed and in it we find the rules which govern the liability of the carrier with respect to the seaworthiness and navigation of the ship."

The District Court had held at 45 F. Supp. 608, 613:

> "Given the status of a private carrier, such as unquestionably was the status of the owner of the Temple Bar in the present instance, it is not incompatible with such status for the vessel owner, if he sees fit to do so, to contract that his liability as a private carrier may be different from what the law would otherwise impose upon him. This is all that the present shipowner has done by agreeing to make himself subject to the provisions of the 1936 Act."

[11] The Court expresaly noted the conflict in other circuits and refused to "go along", stating at page 97:

> "On the other hand the Fourth Circuit [The Atlantic Gulf & West Indies S.S. Lines *v.* Interocean Oil Co., 31 F. (2d) 1006], and the Fifth [The Framlington Court, 69 F. (2d) 300], have held the contrary. . . . So far as the two decisions cited must be construed to deny an unconditional reading of the typed clause we cannot therefore go along, and we conclude that if the damage arose solely from stowing the cargo directly upon the ceiling, it was on charterer's account alone."

All the conflicting clauses in the instant case are printed clauses in the carrier's own form contract.

Again, in *Farr* v. *Hain S. S. Co.*, 2 Cir., 121 F. (2d) 940, 1941 A. M. C. 1282, the Court of Appeals for the Second Circuit sustained the conflict and held that the terms of the incorporated Harter Act were subservient to an inconsistent provision in the same maritime document.

A comparison of the decisions of the Courts of Appeals for the Fourth and Fifth Circuits with those of the Second Circuit demonstrates conclusively that had this matter been presented to the Courts of Appeals for either the Fourth or Fifth Circuits, the petitioner would have had to be given a decree for his full damages (subject only to the limitation contained in the United States Carriage of Goods by Sea Act)[12] or the Courts of Appeals for the Fourth and Fifth Circuits would have had to overrule their prior decisions.

Petitioner's research has disclosed no Court outside the Second Circuit which follows the *Westmoreland* case on this question, whereas the *Framlington Court* and *Agwimoon* cases were followed in a different circuit in *Standard Oil Co. of Calif.* v. *U. S.* (D. C. Calif. 1945), 59 F. Supp. 100, aff'd on other grounds, 9 Cir., 156 F. (2d) 313.

It is important that the Court of Appeals for the Second Circuit is also in direct disagreement with the English House of Lords, which held as recently as 1958 in *Anglo-Saxon Petroleum Company, Ltd.* v. *Adamastos Shipping Co., Ltd.*, [1958] 1 Lloyd's Rep. 73 (not yet officially reported) that the United States Carriage of Goods by Sea Act, when incorporated into a charter party, displaces inconsistent provisions of that same document.[13]

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[12] 46 U. S. C. §1304(5).

[13] The divergence of opinion on this question is high-lighted by the handling of the question in the *Anglo-Saxon* case. Upon trial before the Umpire, it was held the shipowner could not rely upon the Act. The lower court reversed and held that the parties were bound by the Act. The Court of Appeals in turn reversed the lower

It should also be noted that the only pertinent decision by the highest court of a state, which petitioner was able to find, is also in direct conflict with the decisions of the Court of Appeals for the Second Circuit. In *Hipp* v. *Prudential Casualty & Surety Co., of St. Louis, Mo.*, 244 N. W. 346, 60 S. D. 300 (1932), the Court held that a state statute incorporated into a policy of insurance became the law of the contract and prevailed over inconsistent provisions in the policy.[14]

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court and upheld the Umpire. The House of Lords reinstated the decision of the lower court, saying at pages 81, 82, and 84:

> "The parties to a charter-party often wish to incorporate Hague Rules in their agreement: and by that I do not mean, nor do they mean, that they wish to incorporate the *ipsissima verba* of those Rules. They wish to import into the contractual relation between owners and charterers the same standard of obligation, liability, right and immunity as under the Rules subsists between carrier and shipper . . : (page 81).
>
> "Therefore, it is said, let it be granted that the incorporation of the Act is not altogether insensible and that the statutory standard of obligation is contractually imported into the charter-party" (page 82).
>
> "I think the parties intended, as I have already said, to introduce as a term governing their relationship as owners and charterers the limited measure of responsibility prescribed by the American Act. This seems to me so plain that I should properly be regarded as unduly astute if I turned my eye away from it" (page 84).

The House of Lords on page 82 cites with particular approval the "sensible" case of *Golodetz* v. *Kersten, Hunik & Co.*, [K. B. 1926] 24 Lloyd's Rep. 374, where the British Carriage of Goods by Sea Act of 1924, incorporated into an incoming bill of lading (to which the Act did not apply *ex proprio vigore*), was held to have the effect of making the rights and liabilities of the parties the same as if the bill of lading were outgoing. An inconsistent term was held void.

[14] While the *Hipp* case was not a maritime matter, the *ratio decidendi* of the decision is precisely relevant. That was an action by a person injured while a passenger on a bus. He obtained a judgment against the bus company and when it was unsatisfied proceeded against the bus company's indemnity insurer.

The insurer defended on the ground the policy specified that it covered only certain described vehicles and plaintiff was injured

(2) The holding of the Court of Appeals for the Second Circuit that the carrier's definition of the word "package" (Clause 23) prevails over the language in the incorporated Act, which is repeated twice in the bill of lading (Clause 23), admittedly interprets inconsistent bill of lading terms in favor of the shipowner who drafted the words and by so doing is directly contrary to decisions of this Court:

The Caledonia, 157 U. S. 124, 137 (1895);
The Majestic, 166 U. S. 375, 386 (1896)[18]

and also to decisions of the United States Courts of Appeals for the following Circuits:

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in a vehicle not described in the policy. The Court held the clause limiting coverage was subservient to a clause of the policy which incorporated Sections 15 and 16 of Chapter 224, Laws of 1925 of South Dakota, together with any amendments thereto (Chapter 180, Laws 1929).

The pertinent language of the statute reads:

> "Such insurance shall cover the operation of each vehicle, operated by the motor carrier."

The Court held that these sections, by agreement, "not only became a part of the contract but the law of the contract as well."

> "Where the law itself constitutes a part of the contract as it does in this case, such portions of the contract shall prevail in case of conflict with other parts of the contract; therefore that portion of the policy which attempts to limit the coverage of the policy to the particular vehicle described therein must give way to that provision of the policy which provides that the policy shall cover the operations of each vehicle operated by the carrier."

and on page 348:

> "These provisions being incorporated into the policy and being the provisions of law governing the liability of the bus company, they should and do take precedence over any provisions inserted in the policy by the insurer."

[18] Also:

Compagnia La Flecha v. *Brauer*, 168 U. S. 104, 118 (1897);
Calderon v. *Atlas SS. Co.*, 170 U. S. 272, 280 (1898);
Texas & Pacific Ry. Co. v. *Reiss*, 183 U. S. 621, 626 (1901).

Pope & Talbot, Inc. v. *Guernsey-Westbrook Co.*, 9 Cir., 159 F. (2d) 139;
The Framlington Court, 5 Cir., 69 F. (2d) 300, Cert. denied 292 U. S. 651.

The holding is also directly contrary to a prior decision of the same Circuit:

Lines v. *Atlantic Transport Co.*, 2 Cir., 223 Fed. 624.

It is a universal rule of construction that ambiguities in a printed contract prepared by one of the parties are interpreted against the party who prepared the contract. The rule is applied with its greatest force to bills of lading, where it has always been recognized there is a lack of true bargaining power on the part of the shipper.[16] This inequality was admitted by respondent in this case (Vol. II, page 31).

The Court of Appeals in this case held the "package" definition was contrary to the incorporated Carriage of Goods by Sea Act (Vol. II, page 50; App. B., *infra*, page 37). The definition must, therefore, have also conflicted with the two paragraphs of Clause 23 which substantially repeat the language of §4(5) of the Act. This repetition has been admitted by counsel for respondent (Vol. I, page 36). By allowing the carrier's definition to stand, violence was done to the thrice-repeated language that the shipper was entitled to $500 per package ". . . or in case of goods not shipped in packages, per customary freight unit."

This holding is therefore directly contrary to the language and spirit of the *Caledonia, Majestic, Compagnia La*

[16] E.g. *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 441 (1889); *U. S.* v. *Farr Sugar Corp.*, 2 Cir. 191 F. (2d) 370, 374 aff'd. 343 U. S. 236.

Flecha and *Texas Pacific* cases, *supra*, decided by this Court[17] and universally followed in other Circuits where bills of lading or other shipping documents have been construed.[18] E.g. *Pope & Talbot* v. *Guernsey-Westbrook Co.*, 9 Cir., *supra* at 159 F. (2d) page 141; *The Framlington Court*, 5 Cir., *supra*, at 69 F. (2d) page 304.

It appears obvious that had this case been tried in the Fifth or Ninth Circuit (or any other Circuit than the Second) the petitioner would have prevailed. See also *Eldersie S. S. Co.* v. *Borthwick* (1905) A. C. 93 (House of Lords)[19].

(3) The question presented is one of wide international concern to shippers and consignees of goods of all kinds and to ocean carriers trading to and from the United States, since almost all bills of lading, charter parties and other shipping documents incorporate either the Harter Act,[20] the Carriage of Goods by Sea Act of the United States[21]

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[17] These cases have been reaffirmed as late as 1959 in *SS. Monrosa* v. *Carbon Black Export Co.* (U. S. Supreme Court) decided March 30, 1959.

[18] In *Texas & Pacific Railway Co.* v. *Rep*[illegible] *supra*, this Court held on page 626:

> "The language is chosen by the companies for the purpose, among others, of limiting and diminishing their common law liabilities, and if there be any doubt arising from the language used as to its proper meaning or construction, the words should be construed most strongly against the companies, because their officers or agents prepared the instrument, and as the court is to interpret such language, it is, as stated by Mr. Justice Harlan in delivering the opinion of the court in *National Bank* v. *Insurance Company*, 95 U. S. 673, 679:
>
> 'Both reasonable and just that its own words should be construed most strongly against itself.' "

[19] The House of Lords in that case seemingly reconciled two clauses in the shipper's favor but Lord McNaghton stated he was unable to reconcile them and held that "an ambiguous document is no protection" to a shipowner.

[20] 27 U. S. Statutes at Large 445, 46 U. S. C. §§190-196; Robinson on Admiralty (1939) page 496, Footnote 64; 74 U. of Pennsylvania Law Review 602 (1926).

[21] 49 U. S. Statutes at Large pages 1207, 1213, 46 U. S. C. §§1300-1915; *Anglo-Saxon Petroleum Co., Ltd.* v. *Adamastos Shipping Co., Ltd. supra*, at Lloyd's Rep. page 81.

or of some other maritime nation or The Hague Rules.[22] The purpose of the incorporation is to extend the terms of these maritime Acts to cover periods when they do not apply by their own force[23] and thereby give the carrier the benefit of rules which relax their stringent "insurer" status under the General Admiralty Law. Whether or not these incorporating clauses commonly referred to as "Clauses Paramount" make the Act the prevailing law of the contract is the subject of wide disagreement among three Circuits, all equally experienced in the decision of maritime cases. This Court has apparently never been requested to pass on this question where there was a conflict between Circuits. An authoritative decision from this Court is needed to settle these differences and to help bring about the uniformity desired by the framers of the Hague Rules.[24]

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[22] See Knauth on Ocean Bills of Lading (4th Ed. 1953) page 41. See Uniform Forms approved by the New York Produce Exchange, November 6, 1913, amended October 3, 1946, and by the United States Government for its vessels, Poor on Charter Parties and Ocean Bills of Lading (4th Ed., 1954) pages 287, 299; 353, 360; 365, 383; 397, 406-407;

The Clause Paramount in this case is exactly the same as that in the usual form. The on-deck clause (Clause 13) however, incorporates only the carrier's rights, immunities, exceptions and limitations contained in the Act (including §4 (5) thereof).

[23] In the case of the Harter Act, this period would be the entire carriage by a private carrier, to which it is held the Act does not apply *per se*. In the case of the various Carriage of Goods by Sea Acts, all based upon The Hague Rules, the periods would be the custody period before loading and after discharge from the ship, intercoastal shipments, shipments between countries which have not adopted the Hague Rules, cases of private carriage and all on-deck shipments.

[24] Knauth, on Ocean Bills of Lading. (4th Ed. 1953) page 136. The search for uniformity was the keynote of the Congressional hearings on the Carriage of Goods by Sea Act. See Hearings before House Committee on Merchant Marine and Fisheries on the bill S 1152, 74th Congress, Second Session; House Committee Report No. 2217 on the bill S 1152, 74th Congress (page 7). Bill S 1152 became the Carriage of Goods by Sea Act.

It is particularly appropriate also for this Court to exercise its jurisdiction where the question is the weight to be given a federal statute when it is incorporated in a contract.

Conclusion.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

ARTHUR O. LOUIS,
Counsel for Petitioner.

April, 1959.

Appendix A.

Opinion of the District Court.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

PETER PANNELL,
Libelant,

against

SS "AMERICAN FLYER, her engines, boilers, tackle, etc., and UNITED STATES LINES Co.,
Respondent.

Ad. 180-384

Appearances:

HILL, RIVKINS, MIDDLETON, LOUIS & WARBURTON, Esqs., Proctors for Libelant, 96 Fulton Street, New York 38, N. Y., DAVID L. MALOOF, Esq., of Counsel.

KIRLIN, CAMPBELL & KEATING, Esqs., Proctors for Respondent, 120 Broadway, New York 5, N. Y., L. DE GROVE POTTER and RICHARD H. SOMMER, Esqs., of Counsel.

PALMIERI, J.

On or about May 18, 1953 libelant delivered to the respondent and to the SS *American Flyer* at London, England, his auxiliary sailing yacht *Larus* and a dinghy, one bundle of masts, and one bundle of spars for delivery at New York, N. Y. The yacht was shipped on deck in accordance with the terms of a bill of lading issued by respondent

to libelant. Stamped across the face of the bill [redacted] the following notation:

"ON DECK AT SHIPPER'S RISK."

The yacht rested on a cradle which was delivered to respondent by libelant. Two athwartship 4" x 4" shores were placed at each side of the cradle; and the yacht was held in the cradle by means of lashings. The bill listed the gross weight of the shipment as 11 tons.

The SS *American Flyer* arrived at New York, N. Y., on or about May 29, 1953. While the yacht was being unloaded a piece of the ship's tackle broke causing the yacht to fall some 18" into the cradle. The amount of damage thus caused to the yacht is in excess of $500. (The libelant seeks judgment in the sum of $7,788.00). The respondent concedes that it is liable for the damage which occurred to the yacht but denies that it is liable for the amount of damages claimed and contends that its liability is limited to $500 by the terms of the bill.

Respondent's tariff on yachts at the time was as follows:

	Non-Contract	Contract
Up to 2 tons weight	80/-w/m	65/-w/m
Over 2 tons and up to 10 tons weight	85/-w/m	70/-w/m
Over 10 tons and up to 20 tons weight	95/-w/m	80/-w/m
Over 20 tons weight as per agreement		

Freight was originally charged on the basis of 10-20 tons weight at the non-contract rate of 95 sh. per measurement ton, being the dock measurement for the yacht and cradle. Subsequently respondent was informed that the yacht without cradle did not exceed 10 tons and also that the owner was entitled to the contract rate. Therefore, the freight was re-assessed giving libelant the benefit of the contract rate and the rate for yachts between two and ten

tons weight, namely, 70 sh. per measurement ton, and $383.05 was refunded to libelant. Both rates were assessed and calculated for an imaginary rectangular space measured from the bow and the stern of the yacht to the deck of the ship and as wide as the width of the yacht, at 4308'11 cu. ft. A measurement ton is calculated on 40 cu. ft.

The bill contains the following clauses which are pertinent to this action:

> "13. The goods may be stowed in poop, forecastle, deckhouse, shelter deck, passenger space, storeroom, bunker space or any other covered-in space and when so stowed shall be deemed for all purposes, including General Average, to be stowed under deck.
>
> "In respect of goods carried on deck, and stated herein to be so carried, all risk of loss or damage by perils inherent in or incident to such carriage shall be borne by the shipper and consignee, but in all other respects the custody and carriage of such goods shall be governed by the terms of this bill of lading and the carrier shall have the benefit of all and the same rights, immunities, exceptions and limitations contained in said Carriage of Goods by Sea Act, notwithstanding Sec. 1 (c) thereof, or the corresponding provision of any similar Act that may be applicable."
>
> "23. In the event of any loss, damage or delay to or in connection with goods exceeding in actual value $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, the value of the goods shall be deemed to be $500 per package or per customary freight unit, as the case may be, and the carrier's liability, if any, shall be determined on the basis of a value of $500 per package or per customary freight unit, unless the nature and a higher value shall be declared by the shipper in writing before shipment and inserted in this bill of lading.

"In the event a higher value is declared by the shipper in writing and inserted in this bill of lading and extra freight paid thereon is required, the carrier's liability, if any, for loss, damage or delay to or in connection with the goods shall be determined on the basis of such declared value and *pro rata* of such declared value in the case of partial loss or damage, provided such declared value does not exceed the actual value of the goods.

"In the event of any loss, damage or delay to or in connection with the goods of a value of $500 or less than $500 per package, lawful money of the United States or in case of goods not shipped in packages, per customary shipping freight unit, the carrier's liability, if any shall be limited to the invoice value of the goods unless otherwise stated herein, on which basis the rate of freight is adjusted. It is not intended that such invoice value shall be an agreed valuation and it is agreed that in no event shall this clause operate to increase the extent of the carrier's liability beyond the market value, at port of discharge, if that be less than invoice value.

"It is understood that the meaning of the word 'package' includes pieces and all articles of any description except goods shipped in bulk."

"In no event shall the carrier be liable for more than the loss or damage actually sustained. The carrier shall not be liable for any consequential or special damage and shall have the option of replacing any lost goods and of replacing or repairing any damaged goods."

The facts as above set forth are drawn from a stipulation entered into between the parties. In addition, at the trial, libelant conceded that the yacht was not "goods shipped in bulk." Certain other proofs were adduced at the trial, but, with one exception mentioned below, I do not

find that any facts are relevant to my decision other than those set forth above.

The bill shows that the libelant did not enter thereon a declaration of value for the shipment and the freight was accordingly calculated as set forth above. Respondent's tariff, entered in evidence, provided for an additional freight assessment in the case of goods exceeding in value £100 per package, the value of which is declared in writing prior to shipment and inserted in the bill of lading.

Respondent, therefore, while admitting liability for the damage to libelant's yacht, claims that libelant's failure to declare a value for his yacht[1] limits respondent's liability to $500 under clause 23 of the bill, quoted above. This contention is bottomed on a finding that the yacht is a "package" within the meaning of clause 23. Libelant, however, will recover the full measure of the damages he seeks (assuming proof of the *quantum* of damages upon a reference) if the yacht is "goods not shipped in packages." For, in that case, clause 23 of the bill limits respondent's liability to $500 per customary freight unit. The customary freight unit is the "unit upon which the charge for freight is computed." *Petition of Isbrandtsen Co.*, 201 F. 2d 281, 286 (2d Cir. 1953). Since the freight charge was computed on a unit of 40 cubic feet and the shipment contained over 100 such units, the limitation of liability will be set, under libelant's theory, at over $50,000.00, more than enough to allow libelant to recover the damages he here seeks.

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[1] The tariff does not specifically provide an *ad valorem* option for the shipment of yachts. Under a general paragraph dealing with "Valuable Goods," however, a declaration of value is provided for, for "goods exceeding £100 per package. . . ." The tariff contains no special definition of the word "package". Interpreting the word, therefore, in its ordinary, dictionary sense, it is clear that libelant's yacht is not a package. There may be some question, therefore, as to whether libelant was offered the option of declaring the value of his yacht. This issue was not raised by the parties, however, and I will assume that libelant could have declared the value of his yacht.

The issue in this case, accordingly, is not whether libelant, having secured the cheaper freight rate by not declaring the value of his yacht, may now be heard to claim that the respondent's liability is not limited. *Cf. Pan-Am Trade & Credit Corp.* v. *The Campfire*, 156 F. 2d 603, 605 (2d Cir.), *cert. denied*, 329 U. S. 774 (1946). The issue is simply the measure of respondent's limited liability.

I.

The Carriage of Goods by Sea Act, 49 Stat. 1207 (1936), 46 U. S. C. §§1300-1315 (1952), does not regulate the carriage of "cargo which by the contract of carriage is stated as being carried on deck and is so carried." 49 Stat. 1208 (1936), 46 U. S. C. §1301(c) (1952). Accordingly, that Act had no application *ex proprio vigore*, to the instant shipment.

Turning to the bill itself, then, we find "on deck" shipments to be regulated by Clause 13. That clause, quoted above, provides, in pertinent part, that the "custody and carriage of such goods shall be governed by the terms of this bill of lading and the carrier shall have the benefit of all and the same . . . limitations contained in said Carriage of Goods by Sea Act, notwithstanding Sec. 1(c) thereof. . . ." The incorporation of the Carriage of Goods by Sea Act in a bill to cover shipments not otherwise regulated by that Act, is permissible. *Waterman S. S. Corp.* v. *United States S. R. & M. Co.*, 155 F. 2d 687, 691 (5th Cir.), cert. denied, 329 U. S. 761 (1946); *Petition of Isbrandtsen Co.*, 201 F. 2d 281, 285 (2d Cir. 1953). Applying general contract interpretation principles, the particular reference to the Act as containing the measure of respondent's limited liability overrides the general reference to the bill as a whole for determining matters of "custody and carriage," if the Act and the bill contain different limitations.

The Act contains the following provision regarding limitation of the carrier's liability:

> "(5) Neither the carrier nor the ship shall in any event be or become liable for any loss or damage

to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier.

"By agreement between the carrier, master, or agent of the carrier, and the shipper another maximum amount than that mentioned in this paragraph may be fixed: *Provided*, That such maximum shall not be less than the figure above named. In no event shall the carrier be liable for more than the amount of damage actually sustained." 49 Stat. 1211 (1936). 46 U. S. C. §1304 (5) (1952).

Since the bill provides that the respondent's limited liability is to be determined under the Act, therefore, the respondent's liability will be limited to $500 only if the yacht is a "package", as that term is used in the Act. The Court of Appeals for this Circuit has indicated that an uncrated locomotive is not a package, *Petition of Isbrandtsen Co.*, 201 F. 2d 281, 286 (2d Cir. 1953); and has held that a giant amusement crane, which was shipped in pieces, none of which was boxed or crated, was not a package. *Stirnimann* v. *The San Diego*, 148 F. 2d 141, 143 (2d Cir. 1945), *affirming* 55 F. Supp. 798 (S. D. N. Y. 1944). And this Court has held that an uncrated, uncased piece of a rock crusher, shipped knocked down, was not a "package" within the meaning of the Act. *Middle East Agency, Inc.* v. *The John B. Waterman*, 86 F. Supp. 487, 492 (S. D. N. Y. 1949). See also *Waterman S. S. Corp.* v. *United States S. R. & M. Co.*, 1955 F. 2d 687, 693 (5th Cir.), *cert. denied*, 329 U. S. 761 (1946) (structural steel carried on deck not a "package").

The purpose of the Act's limitation section is "to prevent excessive claims in respect of small packages of great

value,' but not to permit carriers to escape liability for just claims. . . .'' *Stirnimann* v. *The San Diego, supra.* See also, *The Bill*, 55 F. Supp. 780, 782 (D. Md.), *aff'd per curiam*, 145 F. 2d 470 (4th Cir. 1944). If this purpose is to be effectuated, the word "package," as used in the Act, is to be interpreted in its dictionary sense: "a bundle or parcel wrapped or made up for . . . transportation." The Act's limitation provision is intended to protect the carrier from the liability which would otherwise be placed upon it for loss to a valuable shipment where, since the nature of the shipment was hidden by its container, the carrier would not be apprised, upon receipt of the package, of the special care which might be required to protect its contents, and the special risks which its carriage might entail. Here, however, the carrier knew exactly what was entrusted to its care, and was put on notice, by receipt of the yacht itself, of what was required to properly handle it. The *Larus* was not wrapped or made up in any manner, it was simply hoisted upon the SS *American Flyer* and lashed to a cradle on deck.

It has been held that uncrated pieces of machinery, bolted to skids, are "packages" within the meaning of the Act. *Middle East Agency, Inc.* v. *The John B. Waterman, supra.*[2] Respondent contends, therefore, that the placement of the yacht in its cradle made the yacht a "package" within the meaning of the Act.[3]

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[2] The Court relied on the decision in *Whaite* v. *Lancashire and Yorkshire Ry. Co.*, L. R. 9 Ex. 467 (1875). In that case a wagon loaded on a truck was held to be a "package". The carrier's employees could determine that the wagon was loaded with paintings, but could not determine their value.

[3] It is, perhaps, also significant that the final freight rate was determined by excluding the weight of the cradle from the weight of the shipment, thus bringing the shipment within the 2 to 10 ton category. The area occupied by the cradle was included in the calculation of the measurement tons to which the rate would be applied; but this appears to have been done because the area under the yacht was not available for other shipments. The Shipping Instructions referred to the shipment as a "cradled sailing yacht." Whatever comfort respondent may receive from this is destroyed, however, by the subsequent actions of the respondent in recomputing the freight charge.

Aside from the fact that the yacht was not bolted to its cradle, the decisions of the Courts of Appeals do not appear to have been influenced by the manner in which the shipments were made fast. Thus, in the *Isbrandtsen* case, *supra*, the locomotives were stowed on rail and timber beds, secured by wire lashings, clips, and turnbuckles. See *Petition of United States*, 105 F. Supp. 353, 357 (S. D. N. Y. 1952), *modified and remanded sub nom. Petition of Isbrandtsen Co.*, 201 F. 2d 281 (2d Cir. 1953). In *Waterman S. S. Corp. v. United States S. R. & M. Co.*, 155 F. 2d 687, 689-90, 693 (5th Cir.), *cert. denied*, 329 U. S. 761 (1946), pieces of structural steel were held not to be packages although the steel was lashed to the deck by galvanized chain. It would seem that the determination of whether an item is a "package" within the meaning of the Act should not turn on the manner in which the cargo is secured.

There remain to be mentioned two decisions which hold that uncrated items of cargo entered in a bill of lading in a column headed "Class and Contents of Packages," are to be considered as packages for the purposes of limitation of liability. *The Margaret Lykes*, 57 F. Supp. 466, 471, 473 (E. D. La. 1944);[4] *R. H. Eyles v. United Fruit Co.*, 1942 A. M. C. 1470 (S. D. N. Y.) (otherwise unreported). The courts in these cases held that the parties had, because of the heading on the column, stipulated that the goods were to be considered "packages". Apart from the fact that the yacht here was entered in a column headed "Description of Goods," I agree with the statement of the Court in *Middle East Agency, Inc. v. The John B. Waterman*, 86 F. Supp. 487, 491 (S. D. N. Y. 1949) that "the use of the printed word 'package' on this bill of lading should (not) be construed as a 'stipulation' of the parties that the tractors were packages under the Act. Any attempt by the carrier to modify the limitation provisions of the Carriage of Goods by Sea Act through a printed provision

[4] The Court further held that whether or not the truck was a "package," it was a "freight unit." Therefore, in either event, the carrier's liability was limited to $500. *The Margaret Lykes*, 57 F. Supp. 466, 471, 473 (E. D. La. 1944).

of a bill of lading should be carefully scrutinized by the courts." I discuss in Part II of this opinion the reasons why I hold that the definition contained in Clause 23 cannot be considered such a stipulation in this case.

Accordingly, since the bill provides that the carrier's liability is limited as provided by the Carriage of Goods by Sea Act, I hold that within the meaning of the Act (and, therefore, the bill), the yacht was not a "package", and that the carrier's liability is limited to $500 per customary freight unit.

II

Respondent urges, however, that the particular definition of "package," set forth in Clause 23 of the bill overrides the reference of the bill to the Act, and, therefore, overrides the meaning of the term "package" as used in the Act. The difficulty with this argument is that the bill, itself, in Clause 13 particularly refers to the Act as the measure of the carrier's limited liability and only generally states that the "custody and carriage" of the goods is regulated by the terms of the bill. Thus, the very canon of construction which respondent urges requires that the measure of the limited liability be determined under the terms of the Act rather than by the particular definition of "package" contained in Clause 23 of the bill.

Assuming, however, that the general statement in Clause 13 that the "carriage and custody" of on deck shipments, shall be governed by the terms of the bill, refers us to the bill rather than the Act for the measure of the carrier's limited liability, I turn now to a consideration of the bill as a whole.

Respondent's argument, at this point, proceeds with syllogistic simplicity: (1) Clause 23 provides that all pieces and articles of any description, "except goods shipped in bulk," are packages. (2) Libelant concedes that the yacht is not "goods shipped in bulk." (3) Therefore, the yacht is a package and respondent's liability is limited to $500. The syllogism fails, however, because the premise is false: Clause 23 cannot, as I will demonstrate, mean what

it says; nor can any reasonable interpretation of Clause 23 permit respondent to limit its liability to $500.

Clause 23 purports to define the term "packages" for all types of shipments under the bill. The definition is unacceptable, however, for shipments to which the Carriage of Goods by Sea Act ('tween deck shipments, generally) applies. This is so because, as to shipments to which the Act applies, the meaning of the word "package" as used in the Act must apply or shipments other than those which are "packages" under the Act would be carried under a limited liability lower than that which the Act provides. While the Act allows a limitation of liability to be set at a higher maximum than that provided in the Act, it forbids a lesser maximum than that set forth in the Act. 49 Stat. 1211 (1936), at U. S. C. §1304 (5) (1952).

The Act provides that the limitation for goods not shipped in packages shall be $500 per customary freight unit. If, as to shipments covered by the Act, the bill were permitted to provide that shipments which the Act considers not to be in packages were to be considered as in packages, and liability, therefore, limited to $500 for the shipment, the carrier's liability would be limited (wherever there is more than one freight unit in the shipment) to a maximum smaller than that permitted by the Act. To allow the definition to stand for shipments covered by the Act, therefore, would mean that the carrier could do, in two sentences, what he could not do in one. *Cf. Bisso* v. *Inland Waterways Corp.*, 349 U. S. 85, 94-5 (1955).

The bill's definition of the term "package," therefore, to the extent that it does not recognize that some cargo not shipped in bulk is also not a package, e.g., locomotives, cranes, structural steel, is void when the shipment involved is one covered by the Act. Indeed, the bill, itself, provides that "(i)f any term of this bill of lading be repugnant to (the Carriage of Goods by Sea Act) to any extent, such term shall be void to that extent but no further." Clause 2.

The question, then, is the extent to which the definition of "package" in Clause 23 is void. As to this, there are at least three possibilities: (1) That the definition is totally

void; (2) That the definition is void only to the extent that it does not recognize a category of cargo which is not shipped in bulk but which is also not to be considered a package; or (3) That the definition is void to the extent set forth in (2) but only when the shipment is governed by the Carriage of Goods by Sea Act; i.e., only for 'tween deck shipments.

If either possibility (1) or (2) is accepted, respondent cannot prevail. Respondent's liability in this case will be limited to $500 only if it is possible to read the definition of "package" as set forth in Clause 23 as follows: "It is understood that the meaning of the word 'package' includes pieces and all articles of any description except goods shipped in bulk, except that this definition is void in respect to goods the shipment of which is regulated by the Carriage of Goods by Sea Act to the extent that it does not recognize a class of cargo which is neither shipped in bulk nor in packages."[5] I would be loath, in any event, to construct so elaborate a definition from what is, on its face, so simple a provision. Such provisions in a bill of lading, furthermore, "inserted by the shipowner for his own benefit, are unquestionably to be construed most strongly against him." *Compania de Navigacion la Flecha* v. *Brauer*, 168 U. S. 104, 118 (1897).

To summarize, the definition of the term "package," as used in the bill to include all shipments not in bulk, cannot mean what it purports to mean, for it conflicts with the Act. To construe it in a manner which will permit the respondent here to succeed is to erect a definition which is not present in the fair intendment of the words used in the bill. Accordingly, I hold that the definition is, at the least, to be construed to adopt, for the purposes of all shipments covered by the bill, the meaning of the word "package" as used in the Carriage of Goods by Sea Act. Accordingly, as shown in Part I of this opinion, the carrier's liability is here limited to $500 per customary freight unit.

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[5] It is possible that a less cumbersome definition could be erected which would be consonant with the Act. Any simpler definition, however, would, contrary to clause 2, void Clause 23 to a greater extent than required by the Act.

III

Although I believe that my conclusion is correct on the basis of the reasoning set forth above, independently of what is to follow, I wish to advert briefly to two other considerations which point to the same conclusion as that arrived at in the above two portions of the opinion.

1. The question in this case may be posed in the following manner, somewhat differently from the way I have stated it above: When a bill of lading contains a provision subjecting a shipment not otherwise governed by the Carriage of Goods by Sea Act, to that Act, and contains a further provision in conflict with the Act, which provision prevails?

The Act, itself, provides that it may be incorporated in the terms of a bill evidencing a coastwise shipment which would otherwise be outside the Act's coverage. 49 Stat. 1212 (1936), 46 U. S. C. §1312 (1952). The statute further provides that when the Act is so adopted the shipment "shall be subjected (thereto) as fully as if subject (thereto) by the express provisions of" the Act. *Id.* When so adopted, the terms of the Act override any inconsistent provision of the bill. *Cities Service Oil Co.* v. *United States,* 203 F. 2d 716 (2d Cir. 1953); *Burdines, Inc.* v. *Pan-Atlantic Steamship Corp.,* 199 F. 2d 571 (5th Cir. 1952). Although the Act itself does not so provide, the courts have held that the Act may also be incorporated for shipments between two foreign ports (to which it does not otherwise apply), *Petition of Isbrandtsen Co.,* 201 F. 2d 281, 285 (2d Cir. 1953); and to on deck shipments (to which it would not otherwise apply), *Waterman S. S. Corp.* v. *United States S. R. & M. Co.,* 155 F. 2d 687, 691 (5th Cir.), *cert. denied,* 329 U. S. 761 (1946). I do not believe that the effect of the incorporation should differ according to whether the incorporation is by permission of the Act itself or by permission of the courts. *Cf. The Vale Royal,* 51 F. Supp. 412, 424 (D. Md. 1943) (Harter Act, 27 Stat. 445 (1893), 46 U. S. C. §§190-196 (1952), (which did not by its terms allow its incorporation in bills of lading not otherwise subject to it); held that

provisions of Act prevail over inconsistent provisions in the bill). Accordingly, I further hold that, as a matter of law, since the bill incorporated the Act, the meaning of the word "package" as used in the Act overrides the inconsistent definition set forth in the bill.

2. The word "package" is used throughout the bill in its ordinary dictionary sense. Thus, in print much larger than that of Clause 23, and at the very head of the bill, the following is found: "Received from the shipper herein named, the goods or packages said to contain goods herein mentioned . . . ." Clause 1 contains the following: "except when inconsistent with the context hereof . . . the word 'goods' shall include the packages said to contain goods . . .; the word 'package' shall include any piece or shipping unit; . . ." Clause 17 refers to "goods out of or separated from their containers or package. . . ." Clause 19 authorizes the carrier to "open packages to examine contents," and further requires that "(f)ull freight shall be paid . . . if packages be empty or partly empty. . . ."

I am aware, of course, "that the same words have not necessarily the same meaning attached to them when found in different parts of the same instrument: their meaning is, controlled by the context." *The Cherokee Nation* v. *The State of Georgia*, 5 Pet. 1, 19 (U. S. 1831). But the peculiarity of the definition sought to be imposed by Clause 23, coupled with the normal use of the term throughout other portions of the bill and the intricate and contradictory structure of the bill, which appears to take away in one clause what it has granted in another—these factors lend additional weight to the conclusion that Clause 23 should not be considered as turning the yacht *Larus* into a package. *Compania de Naviagacion la Flecha* v. *Brauer*, 168 U. S. 104 (1897).

It also appears that Clause 23 is internally inconsistent. The term "packages" is used in it in its ordinary, dictionary sense. It refers to "goods not shipped in packages." It then defines the term "package" as "pieces and all articles of any description except goods shipped in bulk." Substituting the definition for the term in the phrase

"goods not shipped in packages," we arrive at "goods not shipped in pieces and all articles of any description except goods shipped in bulk." Whatever this may mean, it is clear that the yacht is such "goods" and that it was not shipped "in" such a piece or article. Indeed, the yacht was not shipped "in" anything, but on a cradle.

IV.

Accordingly, on the basis of the reasoning set forth in the first three portions of this opinion, I hold that respondent's liability for the damages to libelant's yacht is limited to $500 per customary freight unit. The freight unit in this case is 40 cubic feet. *Petition of Isbrandtsen Co.*, 201 F. 2d 281, 286 (2d Cir. 1953). There being sufficient freight units in this shipment to allow libelant recovery for the full amount he claims, and the respondent having conceded liability, although it denies the quantum of damages, libelant is entitled to an interlocutory decree in its favor referring the issue of damages to a commissioner.

This opinion shall constitute my Findings of Fact and Conclusions of Law.

SUBMIT DECREE.

Dated: New York, N. Y.
December 20, 1957

EDMUND L. PALMIERI,
U. S. D. J.

Interlocutory Decree of the District Court.

UNITED STATES DISTRICT COURT,

FOR THE SECOND CIRCUIT.

PETER PANNELL,
Petitioner,
against
SS AMERICAN FLYER, her engines, boilers, etc. and UNITED STATES LINES COMPANY,
Respondent.

This cause having come on for trial and having been heard on the pleadings and proofs adduced by the respective parties, and having been argued and submitted, and the Court, after due deliberation, having handed down its opinion in writing, dated December 20, 1957, holding respondent, United States Lines Co., liable for the damage to libelant's cargo with a limitation of $500.00 per customary freight unit or per 40 cubic feet, and directing that an interlocutory decree for libelant be entered herein,

Now, on motion of Hill, Rivkins, Middleton, Louis & Warburton, proctors for libelant, it is

ORDERED that the opinion of this Court, heretofore filed herein on December 20, 1957, be, and it hereby is, adopted as the Court's findings of fact and conclusions of law, and it is

ORDERED, ADJUDGED AND DECREED that libelant, Peter Pannell, recover of and from respondent, United States Lines Co., the damages sustained by it by reason of the matters and things alleged in the libel up to an amount

measured by $500.00 times the number of units of 40 cubic feet in the shipment with interest, together with costs, and it is

FURTHER ORDERED that this matter be referred to Morris Douw Ferris, Esq. of 75 Trinity Place, New York City, Special Commissioner, to ascertain and compute the amount due to libelant in the premises, and to report the same to this Court with all convenient speed.

Dated, New York, New York, January 6, 1958.

EDMUND L. PALMIERI,
United States District Judge.

Appendix B.

Opinion of U. S. Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 31—October Term, 1958.

(Argued October 21, 1958 Decided January 28, 1959.)

Docket No. 25040

PETER PANNELL,

Libelant-Appellee,

v.

UNITED STATES LINES COMPANY,

Respondent-Appellant.

Before:

SWAN and MOORE, Circuit Judges, and
KAUFMAN, District Judge.

Appeal from an interlocutory decree of the United States District Court for the Southern District of New York, Palmieri, *J.*, in a libel for damage to cargo. Modified.

KIRLIN, CAMPBELL & KEATING, Proctors for Respondent-Appellant, New York 5, N. Y. L. de Grove Potter and Richard H. Sommer, of Counsel.

HILL, RIVKINS, MIDDLETON, LOUIS & WARBURTON, Proctors for Libelant-Appellee, New York 7, N. Y. David L. Maloof, of Counsel.

SWAN, Circuit Judge:

This is an appeal from an interlocutory decree for libelant in a suit to recover cargo damage. The damaged cargo was a yacht shipped from London to New York on the deck of respondent's S.S. *American Flyer* in May 1953. In unloading the yacht it sustained damage through fault of the carrier. The latter concedes its responsibility but maintains that its liability is limited to $500 by the terms of the contract of carriage. The District Court held it was not so limited, and granted recovery on the basis of $500 per "customary freight unit" pursuant to §4(5) of the United States Carriage of Goods by Sea Act, 46 U. S. C. A. §1304(5), which provides that the carrier shall not be liable "in an amount exceeding $500 per package * * *, or in case of goods not shipped in packages, per customary freight unit, * * * unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading." Judge Palmieri granted recovery on the basis of $500 per customary freight unit and referred to a commissioner computation of the damages. The opinion is reported in 157 F. Supp. 422.

This appeal differs from *Gulf Italia Co.* v. *American Export Lines*, filed herewith, in that here the yacht was carried on deck. Consequently 46 U. S. C. A. §1304(5) does not apply *ex proprio vigore*. See 46 U. S. C. A. §1301(c). However, the bill of lading refers to the Carriage of Goods by Sea Act and the question for decision is what is the legal effect of such reference.

Where a statute is incorporated by reference its provisions are merely terms of the contract evidenced by the bill of lading. *The Westmoreland*, 2 Cir. 86 F. 2d 96, 97; *The Tregenna*, 2 Cir. 121 F. 2d 940, 945 (both relating to incorporation by reference of the Harter Act); *Petterson Lighterage & Towing Corp.*, S. D. N. Y. 154 F. Supp. 461, 467 (Carriage of Goods by Sea Act). Our task therefore, is to construe the contract to give consistent effect, if possible, to all of its terms.

Turning to the bill of lading: In Clause 1 it is provided that "the word 'package' shall include any piece or shipping unit." Clause 13 provides that in respect to goods carried on deck certain risks shall be on the shipper "but in all other respects the custody and carriage of such goods shall be governed by the terms of this bill of lading and the carrier shall have the *benefit* [italics added] of all and the same rights, immunities, exceptions and limitations contained in said Carriage of Goods by Sea Act, notwithstanding Sec. 1(c) thereof, * * *" The fourth paragraph of Clause 23 reads: "It is understood that the meaning of the word 'package' includes pieces and articles of any description except goods shipped in bulk." At the trial libelant's proctor stipulated that the yacht was not goods shipped in bulk. The first paragraph of Clause 2, upon which appellee particularly relies, reads: "This bill of lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act * * * which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the carrier of any of its rights, immunities or limitations or an increase of any of its responsibilities or liabilities under said Act. If any term of this bill of lading be repugnant to said Act to any extent, such term shall be void to that extent but no further."

The parties have defined what "package" means in the bill of lading. We see no reason why this specific definition should not prevail over the general term "package" contained in the Act. It is true that if the Act applied *ex proprio vigore* the yacht, like the tractor in the *Gulf Italia* case, could not be deemed a "package," and the parties by so describing it could not reduce the carrier's liability. But we cannot agree with the District Court's view that because the definition would be void when applied to shipments covered by the Act, it should likewise be ineffective to reduce liability where the Act is not operative as a matter of law. Since the shipper could have declared the value of his yacht and had full protection against damage by paying a higher freight rate, we cannot regard the $500 limitation as in the nature of a "trap."

Decree modified to limit recovery to $500 plus interest and costs.

MOORE, Circuit Judge (concurring in the result):

I concur in the result and in the majority opinion except as herein qualified. The terms of the bill of lading clarifying and giving a more specific meaning to the word "package" are not "repugnant" to the Act. The word "package" in the Act is neither self-defining nor a word of art. The clauses of the bill and of the Act can be read together and the true intent of the parties as to their understanding of "package" thereby be obtained.

For the reasons stated in my opinion in *Gulf Italia Company* v. *S.S. Exiria and American Export Lines, Inc.* I believe that the phrase "customary freight unit" as used in the Act would have applied in this case to the yacht as a whole, rather than to the units of measure used in calculating the freight charged. Since the Act provides a $500 limit of liability "per package * * * or in case of goods not shipped in packages, per customary freight unit * * *," the result which I would reach in this case is the same whether the Act or the specific definition of "package" is applied. Had Congress intended to extend this limitation only to the unit used in calculating freight rate charges if would have been very simple to have so phrased the statute.

Judgment of U. S. Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-eighth day of January, one thousand nine hundred and fifty-nine.

Present:

Hon. THOMAS W. SWAN,
Hon. LEONARD P. MOORE,
Circuit Judges,

Hon. IRVING R. KAUFMAN,
District Judge.

PETER PANNELL,
Libelant-Appellee,

v.

SS AMERICAN FLYER, her engines, etc., and UNITED STATES LINES CO.,
Respondent-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the decree of said District Court

be and it hereby is modified to limit recovery to $500.00, plus interest and costs in accordance with the opinion of this Court, with costs of this court to the appellant.

A. DANIEL FUSARO,
Clerk.